

Jan 30, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

STACY KILPATRICK-THOMPSON,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:17-CV-03036-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 12, 13. Attorney D. James Tree represents Stacy Kilpatrick-Thompson (Plaintiff); Special Assistant United States Attorney Joseph J. Langkamer represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 5. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

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**STATEMENT OF FACTS**

The facts of the case are set forth in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. They are only briefly summarized here.

Plaintiff was 33 years old at the alleged date of onset. Tr. 223. She completed two years of college and became a certified medical assistant in 2008. Tr. 273. Her work history includes the jobs of telephone operator, stocker/receiver, sales associate, route driver, and certified medical assistant. Tr. 274. At the time Plaintiff applied for benefits, she was still working, but she reported that as of October 31, 2012, she had made changes in her work activity due to her conditions and had not grossed over \$1,010.00 a month in earnings. Tr. 273. Plaintiff was on "call in" status at her job as a medical assistant prior to being laid off in February of 2013. Tr. 42, 318.

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## STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

## SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once the claimant establishes that physical or mental impairments prevent her from engaging in her previous occupations. 20 C.F.R. §§

1 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do her past relevant work,  
2 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show  
3 that (1) the claimant can make an adjustment to other work, and (2) specific jobs  
4 exist in the national economy which the claimant can perform. *Batson v. Comm'r*  
5 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant  
6 cannot make an adjustment to other work in the national economy, a finding of  
7 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 8 ADMINISTRATIVE DECISION

9 On June 18, 2015, the ALJ issued a decision finding Plaintiff was not  
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
12 activity since October 31, 2012, the alleged date of onset. Tr. 22

13 At step two, the ALJ determined Plaintiff had the severe impairment of  
14 Crohn’s disease. Tr. 22.

15 At step three, the ALJ found Plaintiff did not have an impairment or  
16 combination of impairments that met or medically equaled the severity of one of  
17 the listed impairments. Tr. 26.

18 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
19 determined she could perform a full range of work at all exertional levels with the  
20 following limitations:

21  
22 The claimant is limited to sitting, standing, and walking for 6-hours in  
23 an 8-hour workday. She must also avoid concentrated exposure to  
24 hazards, such as heights and dangerous moving machinery. In addition  
25 to usual and customary breaks, the claimant will require two additional  
breaks lasting 10-minutes each.

26 Tr. 27. The ALJ identified Plaintiff’s past relevant work as certified medical  
27 assistant, retail sales clerk, customer service clerk, door-to-door sales  
28 representative, shipping and receiving clerk, microfilm processor, courier, and

1 sales attendant. Tr. 30. She concluded that Plaintiff was not able to perform this  
2 past relevant work. *Id.*

3 At step five, the ALJ determined that, considering Plaintiff's age, education,  
4 work experience and residual functional capacity, and based on the testimony of  
5 the vocational expert, there were other jobs that exist in significant numbers in the  
6 national economy Plaintiff could perform, including the jobs of home care  
7 attendant and social service aide. Tr. 31. The ALJ concluded Plaintiff was not  
8 under a disability within the meaning of the Social Security Act at any time from  
9 October 31, 2012, through the date of the ALJ's decision. Tr. 31-32.

### 10 ISSUES

11 The question presented is whether substantial evidence supports the ALJ's  
12 decision denying benefits and, if so, whether that decision is based on proper legal  
13 standards. Plaintiff contends the ALJ erred by (1) failing to properly credit  
14 Plaintiff's symptom statements, (2) failing to properly weigh the medical source  
15 opinions, and (3) failing to make a proper step two determination.

### 16 DISCUSSION

#### 17 1. Plaintiff's Symptom Statements

18 Plaintiff contests the ALJ's determination that her symptoms statements  
19 were less than fully credible. ECF No. 12 at 10-16.

20 It is generally the province of the ALJ to make credibility determinations,  
21 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific  
22 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
23 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's  
24 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d  
25 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).  
26 "General findings are insufficient: rather the ALJ must identify what testimony is  
27 not credible and what evidence undermines the claimant's complaints." *Lester*, 81  
28 F.3d at 834.

1 The ALJ found Plaintiff less than fully credible concerning the intensity,  
2 persistence, and limiting effects of her symptoms. Tr. 29. The ALJ reasoned that  
3 Plaintiff was less than credible because her reported symptoms were (1)  
4 inconsistent with her reported activities and (2) not supported by the medical  
5 evidence. Tr. 28-29.

6 **A. Reported Activities**

7 The ALJ's first reason for finding Plaintiff less than fully credible, that  
8 Plaintiff's reported activities were inconsistent with her reports of disability, does  
9 not meet the specific, clear and convincing standard.

10 A claimant's daily activities may support an adverse credibility finding if (1)  
11 the claimant's activities contradict her other testimony, or (2) "the claimant is able  
12 to spend a substantial part of [her] day engaged in pursuits involving performance  
13 of physical functions that are transferable to a work setting." *Orn v. Astrue*, 495  
14 F.3d 625, 639 (9th Cir. 2007). (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.  
15 1989)). "The ALJ must make 'specific findings relating to [the daily] activities'  
16 and their transferability to conclude that a claimant's daily activities warrant an  
17 adverse credibility determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676,  
18 681 (9th Cir. 2005)). A claimant need not be "utterly incapacitated" to be eligible  
19 for benefits. *Fair*, 885 F.2d at 603.

20 The ALJ found that Plaintiff's activities of driving, cleaning, preparing  
21 meals, reading, running errands, walking dogs, attending her child's school  
22 conferences and appointments, and attending her own appointments were  
23 inconsistent with Plaintiff's testimony "that the residual symptoms of her headache  
24 and abdominal issues prevent her from performing full-time work." Tr. 29. Here,  
25 the ALJ failed to provide any explanation of how attending to these activities was  
26 either inconsistent with Plaintiff's other testimony or how these activities  
27 demonstrated that she was able to spend of substantial part of her day engaged in  
28 physical functions that were transferable to a work setting. Therefore, this reason

1 fails to meet the specific, clear and convincing standard.

2        Additionally, the ALJ specifically pointed to Plaintiff's planned pregnancy  
3 as "undermin[ing] her allegations regarding her functional capabilities." Tr. 29.  
4 However, again, the ALJ failed to address how a planned pregnancy was  
5 inconsistent with Plaintiff's other testimony. Therefore, this is not sufficient to  
6 support the ALJ's determination.

## 7        **B. Medical Evidence**

8        The ALJ's second reason for finding Plaintiff less than fully credible, that  
9 Plaintiff's symptoms were not supported by objective medical evidence, is not a  
10 specific, clear, and convincing reason to undermine Plaintiff's credibility.  
11 Although objective medical evidence is a "relevant factor in determining the  
12 severity of the claimant's pain and its disabling effects," it cannot serve as the sole  
13 ground for rejecting a claimant's credibility. *Rollins v. Massanari*, 261 F.3d 853,  
14 857 (9th Cir. 2001). Here, the ALJ failed to provide another reason that meets the  
15 specific, clear and convincing standard. Therefore, the ALJ's determination that  
16 the medical evidence failed to support Plaintiff's allegations was not sufficient to  
17 support her overall determination that Plaintiff's symptoms statements were less  
18 than fully credible.

19        The case is therefore remanded for the ALJ to properly address Plaintiff's  
20 symptoms statements.

## 21        **2. Medical Opinions**

22        Plaintiff challenges the ALJ's treatment of the opinions of treating sources,  
23 Daniel Kwon, M.D. and Shannon L. Neer, PA-C, and nonexamining reviewer,  
24 Brent Packer, M.D. ECF No. 12 at 16-20.

25        In weighing medical source opinions, the ALJ should distinguish between  
26 three different types of physicians: (1) treating physicians, who actually treat the  
27 claimant; (2) examining physicians, who examine but do not treat the claimant;  
28 and, (3) nonexamining physicians who neither treat nor examine the claimant.

1 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a  
2 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at  
3 631. Likewise, the ALJ should give more weight to the opinion of an examining  
4 physician than to the opinion of a nonexamining physician. *Id.*

5 When a treating physician's opinion is not contradicted by another  
6 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.  
7 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating  
8 physician's opinion is contradicted by another physician, the ALJ is only required  
9 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*  
10 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). The specific and legitimate standard  
11 can be met by the ALJ setting out a detailed and thorough summary of the facts  
12 and conflicting clinical evidence, stating her interpretation thereof, and making  
13 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is  
14 required to do more than offer her conclusions, she "must set forth [her]  
15 interpretations and explain why they, rather than the doctors', are correct."  
16 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

17 **A. Daniel Kwon, M.D.**

18 On February 28, 2013, Dr. Kwon penned a treatment note that addressed  
19 Plaintiff's functional abilities. Tr. 317-18. Dr. Kwon stated that Plaintiff "is on an  
20 available status but unable to work on a regular, continual basis secondary to her  
21 flare-ups of her pain which have limited her functioning. We feel that temporary  
22 disability until these issues are resolved or stabilized would be reasonable and  
23 encouraged her to look into that option." Tr. 318. In her decision, the ALJ did not  
24 address Dr. Kwon's statements as an opinion, but she did cite to the treatment note  
25 when discussing step two, Tr. 23-24, step three, Tr. 26, and Plaintiff's reported  
26 activities, Tr. 29.

27 Social Security Ruling (S.S.R.) 96-8p states that the residual functional  
28 capacity assessment "must always consider and address medical source opinions.



1 If the [residual functional capacity] assessment conflicts with an opinion from a  
2 medical source, the adjudicator must explain why the opinion was not adopted.”  
3 An ALJ’s failure to address medical source opinions in her determination is not  
4 harmless error. *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012) *citing* 20  
5 C.F.R. § 404.1527(c) (“Regardless of its source, we will evaluate every medical  
6 opinion we receive”).

7 Here, the ALJ’s failure to address Dr. Kwon’s opinion that Plaintiff’s  
8 impairments resulted in her being “unable to work on a regular, continual basis,” is  
9 an error. Defendant argues that the ALJ’s citation to the report in her decision at  
10 step two, step three, and in assessing Plaintiff’s symptom statements was sufficient  
11 to withstand Plaintiff’s challenge because the report showed that Plaintiff was not  
12 as limited as she claimed. ECF No. 13 at 9. However, the ALJ was required to  
13 address Dr. Kwon’s medical opinion. *See Garrison v. Colvin*, 759 F.3d 995, 1012-  
14 13 (9th Cir. 2014) (Where an ALJ “rejects a medical opinion or assigns it little  
15 weight while doing nothing more than ignoring it, asserting without explanation  
16 that another medical opinion is more persuasive, or criticizing it with boilerplate  
17 language that fails to offer a substantive basis for [her] conclusion,” she errs).  
18 Furthermore, she was required to explain why Dr. Kwon’s opinion was not  
19 adopted in the residual functional capacity assessment. S.S.R. 96-8p. Defendant’s  
20 assertion that Dr. Kwon’s report shows Plaintiff was not as limited as she alleged  
21 speaks to the reliability of Plaintiff’s symptom statements and not the reliability of  
22 Dr. Kwon’s opinion. Therefore, Defendant’s argument is unpersuasive.

23 In addition to a new analysis of Plaintiff’s symptom statements, upon  
24 remand the ALJ will address Dr. Kwon’s opinion.

25 **B. Shannon L. Neer, PA-C**

26 On March 12, 2013, Physician Assistant Neer sent a letter to the Washington  
27 Department of Social and Health Services (DSHS) stating that Plaintiff was  
28 “having much difficulty maintaining full time employment due to multiple medical

1 conditions that cause her to have multiple absences,” and continued that “[f]or the  
2 same reason she is unable to reliably search for full time employment. She has  
3 been placed on a part time status by her current employer as she is a valuable  
4 worker in hopes that once her medical conditions have become well controlled she  
5 will return to full time status again.” Tr. 443.

6 On September 13, 2013, Physician Assistant Neer completed another letter  
7 to DSHS stating that Plaintiff was “having much difficulty maintaining full time  
8 employment due to multiple medical conditions that cause her to have multiple  
9 absences. For the same reason she is unable to reliably search for full time  
10 employment.” Tr. 379, 507. Additionally, Physician Assistant Neer approximated  
11 that Plaintiff would not be able to return to work for twelve months. *Id.*

12 The ALJ gave these letters little weight because (1) a disability  
13 determination is reserved for the Commissioner, (2) a physician assistant is not an  
14 acceptable medical source, (3) the statement is conclusory, and (4) Plaintiff had  
15 reduced and eventually stopped taking her medication following these opinions.  
16 Tr. 28.

17 The ALJ is accurate that whether or not a claimant is disabled is an issue  
18 reserved for the Commissioner and is, therefore, not a medical opinion and not due  
19 any special significance. 20 C.F.R. §§ 404.1527(d); 416.927(d). However,  
20 Physician Assistant Neer’s opinions addressing the potential for missed work are  
21 considered functional opinions and must be addressed by the ALJ. *See Hill*, 698  
22 F.3d at 1160 (a treating physician’s statement that the claimant would be  
23 “unlikely” to work full time was not a conclusory statement like those described in  
24 20 C.F.R. § 404.1527(d).).

25 The ALJ was also accurate that a physician assistant is not an acceptable  
26 medical source. An ALJ is required, however, to consider evidence from “other

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1 sources,” 20 C.F.R. §§ 404.1513(d), 416.913(d) (2016),<sup>1</sup> “as to how an impairment  
2 affects a claimant’s ability to work,” *Sprague*, 812 F.2d at 1232. Therefore, it is  
3 not a valid reason for rejecting the opinion. The Ninth Circuit has held that an ALJ  
4 must give “germane” reasons to discount evidence from “other sources.” *Dodrill v.*  
5 *Shalala*, 12 F.3d 915 (9th Cir. 1993).

6 The ALJ’s findings that the opinion was conclusory and inconsistent with  
7 instructions that Plaintiff taper down her medications meets the germane standard.  
8 An ALJ can discredit a treating physicians’ opinions that are conclusory, brief, and  
9 inadequately supported by clinical findings. *Thomas v. Barnhart*, 278 F.3d 947,  
10 957 (9th Cir. 2002). Here, the opinion is brief and conclusory and Physician  
11 Assistant Neer provides little evidence to justify her conclusion. However,  
12 considering the case is being remanded for the ALJ to properly address a similar  
13 opinion by Dr. Kwon, the ALJ will also readdress Physician Assistant Neer’s  
14 opinion on remand.

15 On November 16, 2013, Physician Assistant Neer completed a Medical  
16 Report form stating that she had treated Plaintiff since Plaintiff was eighteen years  
17 old. Tr. 348-49. She opined that Plaintiff would have to lie down during the day  
18 due to her conditions. Tr. 348. Additionally, she opined that work on a regular  
19 and continuous basis would cause Plaintiff’s condition to deteriorate and that if she  
20 were to work on a forty-hour a week schedule, she would expect Plaintiff to miss  
21 four or more days of work in a month. Tr. 349. Again, the ALJ gave this opinion  
22 little weight because it was from a physician assistant and it was unsupported by  
23 the longitudinal medical record. Tr. 30. As addressed above, the fact that Shannon  
24 Neer is a physician assistant is not sufficient to support rejecting her opinion.  
25 However, under the germane standard a determination that the opinion was  
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27 <sup>1</sup>On March 27, 2017, these regulations were amended and the instructions on  
28 how to weigh “other sources” now appear at 20 C.F.R. §§ 404.1527(f), 416.927(f).

1 inconsistent with the record as a whole, would be sufficient to support the ALJ's  
2 determination.

3 Seeing as the case is being remanded for the ALJ to further address Dr.  
4 Kwon's opinion, the ALJ will also address Physician Assistant Neer's Medical  
5 Report form upon remand.

6 **C. Brent Packer, M.D.**

7 On February 18, 2014, Dr. Packer reviewed the records of Dr. Kwon and  
8 Thomas Genthe, Ph.D. Tr. 364. He opined that Plaintiff was limited to "less than  
9 sedentary highest work activity," and that Plaintiff was "unable to sustain  
10 stand/walk even brief periods; she is unable to sustain [fulltime] work. She would  
11 have 'severe' limitation on ability to maintain regular workplace attendance." Tr.  
12 364. He opined that this was based on Dr. Kwon's December 30, 2013 note which  
13 reflected an accurate date of onset. Tr. 364-65. Additionally he found that the  
14 severity of Plaintiff's impairment "approaches [the] level required to equal SSA  
15 listing 11.03 due to the headaches." Tr. 364. The ALJ gave this opinion limited  
16 weight because it was "without substantial support from the other evidence of  
17 record," and "the physician's opinion appears to rely in part on an assessment of an  
18 impairment of which he did not treat." Tr. 29-30.

19 Considering this opinion is directly based on Dr. Kwon's records and this  
20 Court is remanding this case for the ALJ to properly address Dr. Kwon's opinion,  
21 the ALJ is further instructed to readdress Dr. Packer's opinion on remand.

22 **3. Step Two**

23 Plaintiff alleges that the ALJ erred at step two by finding Plaintiff's migraine  
24 headaches were not severe. ECF No. 12 at 5-10.

25 Step-two of the sequential evaluation process requires the ALJ to determine  
26 whether or not the claimant "has a medically severe impairment or combination of  
27 impairments." *Smolen*, 80 F.3d at 1290 (citation omitted). "An impairment or  
28 combination of impairments can be found 'not severe' only if the evidence

1 establishes a slight abnormality that has ‘no more than a minimal effect on an  
2 individual[’]s ability to work.’” *Id.* The step-two analysis is “a *de minimis*  
3 screening device to dispose of groundless claims.” *Id.*

4 Here, the ALJ found that Plaintiff had a medically determinable impairment  
5 of migraine headaches, but that her impairment was not severe. Tr. 23. The ALJ  
6 based this determination on her findings that Plaintiff’s migraines were under  
7 control with medication, Plaintiff’s migraines did not prevent her from hiking, and  
8 Plaintiff did not exhibit the symptoms of nausea or vomiting. *Id.*

9 Here, despite the ALJ’s citation to the record that Plaintiff’s migraines were  
10 under control with medication, the ALJ’s findings were not supported by  
11 substantial evidence. First, the ALJ referenced a statement by Plaintiff’s provider,  
12 Dr. Kwon, that her prescribed medications controlled her pain sufficiently allowing  
13 her to function and participate in family life. Tr. 23 *citing* Tr. 317. The full  
14 sentence the ALJ references states “She has tried numerous medications and they  
15 do help control her pain enough where she can function and participate in her  
16 family life, but her work and her career have been put on hold secondary to her  
17 pain issues.” Tr. 317. Therefore, the ALJ’s first citation to the record is a  
18 misrepresentation. The ALJ’s second citation, that in 2015 Plaintiff admitted that  
19 she was not taking any migraine medications due to her pregnancy, Tr. 23, does  
20 not support the ALJ’s conclusion that her migraines were under control. In  
21 February of 2015, Dr. Kwon noted that since stopping her medications due to her  
22 recent pregnancy Plaintiff “does have some more frequent [*sic*] her headaches is  
23 [*sic*] controlled and she would rather take lower doses to reduce risks to the fetus.”  
24 Tr. 429. While somewhat unclear, Dr. Kwon’s statement appears to indicate that  
25 Plaintiff was actually having more headaches since stopping the medications.  
26 Additionally, Dr. Kwon advised Plaintiff to use the least amount of her migraine  
27 medication as possible. Tr. 430. This record does not show that Plaintiff reduced  
28 or stopped her medications because her migraines were nonsevere, but that her

1 provider instructed her to reduce or stop taking her medications due to her other  
2 health concerns, i.e. her pregnancy, and with the reduction of medication her  
3 symptoms increased. Therefore, the ALJ's conclusion is not supported by  
4 substantial evidence.

5 Next the ALJ referred to two records showing Plaintiff was able to hike  
6 eight miles a day. Tr. 23 *citing* Tr. 369, 518. The ALJ implied that this kind of  
7 activity was inconsistent with Plaintiff's complaint of debilitating headaches. *Id.*  
8 However, Plaintiff was consistently instructed to remain active and exercise as part  
9 of her treatment. Tr. 318, 333, 356. Following the advice of her provider is not  
10 inconsistent with a severe medically determinable impairment. Additionally, the  
11 ALJ failed to state how hiking some days when Plaintiff felt well is inconsistent  
12 with intermittent migraines that precluded her from working on other days, but not  
13 all days. This is consistent with Plaintiff's report to her provider that on some days  
14 she has to remain home if the pain is not controlled by medication and on other  
15 days she will go on an eight mile hike. Tr. 369. Therefore, the ALJ's reason is not  
16 legally sufficient.

17 The ALJ's third reason for finding Plaintiff's migraine headaches were not  
18 severe was that Plaintiff denied experiencing the alleged symptoms associated with  
19 her migraines, such as nausea or vomiting. Tr. 23 *citing* Tr. 429. However, the  
20 citation to the record the ALJ provided, Exhibit 11F pg. 1, does not discuss the  
21 symptoms of nausea or vomiting. *See* Tr. 429. Therefore, this reason is not  
22 supported by substantial evidence.

23 Upon remand, the ALJ is instructed to make a new step two determination  
24 addressing Plaintiff's migraine headaches.

### 25 **REMEDY**

26 The decision whether to remand for further proceedings or reverse and  
27 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
28 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate

1 where “no useful purpose would be served by further administrative proceedings,  
2 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*  
3 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
4 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
5 (9th Cir. 1990). *See also Garrison*, 759 F.3d at 1021 (noting that a district court  
6 may abuse its discretion not to remand for benefits when all of these conditions are  
7 met). This policy is based on the “need to expedite disability claims.” *Varney*,  
8 859 F.2d at 1401. But where there are outstanding issues that must be resolved  
9 before a determination can be made, and it is not clear from the record that the ALJ  
10 would be required to find a claimant disabled if all the evidence were properly  
11 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96  
12 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

13 In this case, it is not clear from the record that the ALJ would be required to  
14 find Plaintiff disabled if all the evidence were properly evaluated. Further  
15 proceedings are necessary for the ALJ to address all the medical source opinions in  
16 the record, to assess the reliability of Plaintiff’s symptom statements, and to make  
17 a new step two determination. The ALJ will also need to supplement the record  
18 with any outstanding evidence and call a medical and vocational expert to testify at  
19 any remand proceedings.

## 20 CONCLUSION

21 Accordingly, **IT IS ORDERED:**

22 1. Defendant’s Motion for Summary Judgment, **ECF No. 13**, is  
23 **DENIED**.

24 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is  
25 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for  
26 additional proceedings consistent with this Order.

27 3. Application for attorney fees may be filed by separate motion.

28 The District Court Executive is directed to file this Order and provide a copy

1 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
2 and the file shall be **CLOSED**.

3 DATED January 30, 2018.



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A handwritten signature in dark ink, consisting of a stylized, cursive 'M' followed by a few loops, representing John T. Rodgers.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE